VOLKSWAGEN GROUP MALAYSIA SDN BHD v. LOO CHAY MENG

HIGH COURT MALAYA, KUALA LUMPUR
LAU BEE LAN J
[ORIGINATING SUMMONS NO: 24NCC-86-03-2015]
29 DECEMBER 2015

CIVIL PROCEDURE: *Service – Service of documents – Notice of application – Failure to attend court for hearing – Whether affidavit of service revealed that cause papers duly served – Whether defendant ought to be present in court – Whether hearing proceeded without attendance of defendant*

CIVIL PROCEDURE: *Injunction – Injunction to restrain winding up petition – Application for – Whether application served within time to defendant – Whether application academic and court had jurisdiction to grant injunction to restrain further performance – Whether defendant's notice under s. 218 Companies Act 1965 made mala fide – Whether defendant's application to set aside application allowed – Rules of Court 2012, O. 29 r. 1(2B) & (2BA)*

INSURANCE: *Warranty – Extended warranty policy – Service of vehicle – Whether serviced on time – Whether in excess of mileage – Whether warranty void – Whether policy requires vehicle to be serviced in accordance with service requirements of manufacturer – Whether defendant breached terms of extended warranty*

The plaintiff was a car distributor and seller for Volkswagen cars in Malaysia. In 2011, the defendant purchased a Volkswagen Passat CC ('the vehicle') from the plaintiff. The vehicle was under a warranty for the first two years by the manufacturer and extended for a further three years under the extended warranty policy ('EWP') issued by Allianz General Insurance Company (M) Bhd ('the insurance company') from 25 November 2013 until 24 November 2016. *Vide* notice under s. 218 of the Companies Act 1965 ('s. 218 notice'), the defendant demanded a sum of RM2,973 from the plaintiff as a claim for refund of the sum to the defendant premised on the allegation that the vehicle was not covered under the EWP for the said sum. The plaintiff, however, disputed this sum and argued that the extended warranty was voided since the vehicle was not serviced on time in accordance with the service interval stipulated by the manufacturer. The vehicle was only sent for servicing when the mileage was in excess of 2,136 km. As a result, it was asserted that the defendant had breached the terms of the EWP. The plaintiff, however, placed the sum of RM2,973 into the plaintiff's solicitor's account as stakeholder in view of the future winding up proceedings initiated by the defendant. In the circumstances, the plaintiff filed an originating summons ('encl. 2') and sought for, *inter alia*, (i) an injunctive relief to restrain the defendant and/or his agent from taking any execution proceedings or from filing a winding up petition against the

plaintiff in the absence of a judgment; and (ii) a declaration that the plaintiff was not responsible for the further warranties in respect of the vehicle. The plaintiff also filed an application *vide* encl. 14 to amend prayer (b) of encl. 2. Apart from encl. 2, the plaintiff filed an application *vide* encl. 4 for an *ex parte* interim order to injunct the defendant from presenting the winding up petition. The injunctive relief sought by the plaintiff was in the nature of a Fortuna injunction based on *Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation of the Commonwealth of Australia*. During the hearing of encl. 4, the plaintiff's counsel submitted that since the court directed the application to be served on the defendant as it would be heard on an *inter partes* basis, on 10 March 2015, the plaintiff served the said application on the defendant's law firm by fax and e-mail. The defendant, however, did not attend court for the hearing since he alleged that encl. 4 was not served on him. Nevertheless, the court proceeded with the hearing and granted the injunctive order ('order dated 10 March 2015'). The defendant then proceeded to file encl. 9 to set aside the order dated 10 March 2015 and alleged that (a) since encl. 4 was not served on him, O. 29 r. 1(2B) of the Rules of Court 2012 ('ROC') applied where the *ex parte* order would have automatically lapsed 21 days thereof, *ie*, on 31 March 2015; (b) there was non-compliance with O. 29 r. 1(2BA) of the ROC; (c) since the winding up petition was presented on 9 March 2015, encl. 4 would have been academic and the court had no jurisdiction to grant an injunction to restrain further performance; and (d) it was the plaintiff's conduct that was highly unprofessional and fraudulent to use the 'first service no chop' excuse to repudiate the five year warranty which had induced the defendant to purchase the vehicle. Enclosures 2, 9 and 14 were heard together.

Held (allowing encls. 2 and 14; dismissing encl. 9 with costs):

(1) Enclosure 4 was served on the defendant by fax and e-mail, as proved by the affidavit of service. Since encl. 4 had been served on the defendant, the defendant ought to be present in court instead of giving excuses of non-service. In the circumstances, there was proper service of encl. 4 and O. 29 rr. 1(2B) and 1(2BA) of the ROC did not apply in the context of the present case. (paras 17 & 18)

(2) Following *Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd*, the defendant's argument that the plaintiff's application for injunctive relief is academic as the winding up petition was presented could not be sustained. Further, the argument that this court had no jurisdiction to grant injunctive relief was misconceived (*Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd*; dist). (paras 15 & 21)

(3) The fact that the plaintiff had deposited the sum of RM2,973 to its solicitors as stakeholders showed that the plaintiff was able to pay the alleged debt and there was no issue of the plaintiff's inability to pay its

debt as alleged in the s. 218 notice. The defendant's action to enforce the payment of the disputed debt was made *mala fide* and with the intention of pressuring the plaintiff to pay a disputed debt and was an abuse of the court process. In the circumstances, the defendant's application to set aside the order dated 10 March 2015 was dismissed with costs. (paras 23 & 24)

(4) In relation to encl. 14, the proposed amendment would not cause prejudice to the defendant. Further, order in terms was granted to the plaintiff in relation to encl. 14 since no affidavit in reply was filed by the defendant to rebut the averments in the affidavit in support to encl. 14. (paras 25 & 27)

(5) The extended warranty was voided by the defendant's own breach and the plaintiff was not responsible for the said warranty. The defendant breached the terms of the extended warranty at the third service interval when he serviced the vehicle in excess of 2,136km. This was brought to the defendant's attention when he issued the second s. 218 notice for the sum of RM973.75 on 12 September 2014. This showed that the defendant was aware of the breach as early as 9 September 2014 *vide* the plaintiff's solicitor's letter dated 9 September 2014 that the extended warranty was voided. In the circumstances, the defendant was not allowed to take advantage of the situation brought about by his own act or omission. (paras 32 & 36)

Case(s) referred to:

Azman & Tay Associates Sdn Bhd v. Sentul Raya Sdn Bhd [2002] 4 CLJ 391 HC ***(refd)***

Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd [1988] 2 CLJ 424; [1988] 1 CLJ (Rep) 5 SC ***(dist)***

Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation of the Commonwealth of Australia [1978] VR 83 ***(foll)***

Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd [2007] 3 CLJ 295 CA ***(refd)***

Poon Guan Sdn Bhd v. Sem Siong Industries Sdn Bhd [1983] 2 CLJ 208; [1983] CLJ (Rep) 326 FC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 218

Rules of Court 2012, O. 29 r. 1(2B), (2BA)

For the plaintiff - KC Tang & YM Sin; M/s Raja Ariff & Sin

For the defendant - Loo Chay Meng & Nor Hamiah Abd Hamid Hasani; M/s Abu Hassan & Assocs

Reported by Kumitha Abd Majid

JUDGMENT

Lau Bee Lan J:

Introduction

[1] There are three applications involved in this proceeding, two filed by the plaintiff and one filed by the defendant:

(a) encl. 2 is the plaintiff's originating summons for (i) injunctive relief to restrain the defendant and/or his agent from taking any execution proceedings or from filing a winding up petition against the plaintiff in the absence of a judgment; (ii) a declaration that the plaintiff is not responsible for the further warranties in respect of the vehicle, Volkswagen Passat CC, Registration No. BLM 7770; (c) costs;

(b) encl. 14 is the plaintiff's application is to amend prayer (b) of the originating summons (encl. 2) in the following terms: ie, "for a declaration that the plaintiff would not be responsible for the extended warranty of a vehicle of the type Volkswagen Passat CC Bearing Registration No. BLM 7770 between 26 November 2013 till 12 February 2015" (prayer (a)); and costs to be borne by the plaintiff (prayer (b)); and

(c) encl. 9 is the defendant's application to set aside the *ex parte* injunctive order granted on 10 March 2015.

[2] Apart from the originating summons filed on 3 March 2015, the plaintiff has filed an application for an *ex parte* interim order to injunct the defendant from presenting the winding up petition *vide* encl. 4. Enclosure 4 comprised of an undertaking as to damages by the plaintiff (prayer (a) and prayer (b)) for the injunctive relief as follows:

> satu perintah bahawa Defendan sama ada melalui diri sendiri atau pun wakil atau pekerja-pekerja atau agen Defendan atau mana-mana satu daripada mereka atau dengan apa jua cara lain, dihalang daripada **memfailkan atau menyebabkan untuk difailkan apa-apa petisyen di bawah Akta Syarikat 1965** untuk menggulungkan Plaintif yang dinamakan di atas, dan mengambil apa-apa langkah dalam apa-apa bentuk dan/atau apa-apa cara sekalipun terhadap Plaintif sehingga keputusan muktamad tuntutan Plaintif terhadap Defendan ditentukan.
>
> (emphasis added)

[3] Prayer (b) of encl. 4 is similar to prayer (a) of the originating summons except it is more detailed.

[4] During the hearing of encl. 4, learned counsel for the plaintiff, Dato' Sin Yoong Ming told the court:

> Court has directed I personally went to the Defendant's law firm, i.e. M/s Abu Hassan & Associates. I have served on him the OS and *ex parte* application at his office. He called me that the Bundle did not contain the OS (*ex parte*). I emailed and faxed the entire Notis Permohonan (*ex parte*).

I was informed that he had filed the Notis Permohonan Petition against the Plaintiff in Shah Alam High Court yesterday and he give me a copy of the Payment Notice.

For that reason he informed the Court that he will not be present.

[5] Being satisfied that defendant has been duly informed of the hearing which I intended to be heard on an *inter parte* basis (see affidavit of service affirmed by Dato' Sin on 13 March 2015 (encl. 8) I proceeded with the hearing of the encl. 4 and heard the arguments for a *Fortuna* injunction.

[6] Mr KC Tang (lead counsel) for the plaintiff applied orally to amend prayer (b) of encl. 4 to reflect the recent development which the court granted in the following terms ie, the words emboldened in line 3 of prayer (b) above is substituted with the words "meneruskan atau mengambil apa-apa langkah dalam prosiding atau tindakan guaman untuk …".

[7] I granted the injunctive order on 10 March 2015 with costs in the cause (see encl. 7, fair copy of the injunctive order).

[8] On 15 April 2015, encls.14, 9 and 2 were all heard together and on 5 May 2015 I made the following orders:

(i) encl. 14 was allowed in terms of prayers (a) and (b);

(ii) encl. 9 was dismissed with costs of RM3,000 to be paid by the defendant to the plaintiff; and

(iii) encl. 2 was allowed in terms of prayer (b) with costs of RM3,000 to be paid by the defendant to the plaintiff.

[9] The defendant has appealed against the aforesaid decisions. Herein below are the reasons for the decisions.

Brief Facts

[10] The plaintiff is a car distributor and seller for Volkswagen cars in Malaysia and has been incorporated under the Malaysian Companies Act 1965 on 25 December 2005. The defendant is a customer to the plaintiff.

[11] The defendant bought a Volkswagen Passat CC ('the vehicle') from the plaintiff *vide* a Purchasing Order No: 03749 dated 14 November 2011 made by FA Wagen Sdn Bhd and was registered as BLM 7770. The vehicle was under a warranty for the first two (2) years by the manufacturer and extended for three (3) years under the 'extended warranty policy (EWP)' issued by Allianz General Insurance Company (M) Bhd under the Certificate No: 10AK900018#KP014199.

[12] The defendant had issued a s. 218 notice dated 12 February 2015 ('third s. 218 notice') against the plaintiff premised on the allegation that the vehicle is still under the warranty and claimed remedy of RM2,973

from the plaintiff as an amount outstanding. Earlier on 25 February 2014 and 12 September 2014, the defendant had issued two notices pursuant to s. 218 of the Companies Act 1965 for the claimed amount.

[13] The plaintiff had placed money amounting to RM2,973 to plaintiff's solicitor's account in view of future winding up proceeding initiated by the defendant.

Arguments

Enclosure 9

[14] The defendant contends that (a) as the winding up petition was presented on 9 March 2015, encl. 4 would have been academic and the court has no jurisdiction to grant an injunction to restrain further performance; (b) it was discovered that encl. 4 was not enclosed when plaintiff made the service on 10 March 2015. Since encl. 4 was not served, O. 29 r. 1(2B) applies and the *ex parte* order would be deemed to have "automatically lapsed" 21 days thereof ie, on 31 March 2015. Under O. 29 r. 1(2BA), the said *ex parte* order must be served within seven days thereof and a return date must be fixed before 14 days thereof; (c) the plaintiff, knowing that the winding up petition has been presented should have withdrawn encl. 4. Every opportunity must be given to him to be heard and heard properly, with all the cause papers properly served; (d) the plaintiff had committed material non-disclosure or concealment of a material fact to this court in that a demand letter was sent by defendant's solicitor on 9 February 2015 listing down the reason for his claim of RM2,973. The letter was not disclosed to this court. All the facts stated in the 9 February 2015 letter were never disputed by the plaintiff; (e) since the plaintiff never disputed the defendant's allegation that the claim for refund of RM2,973 is genuine, s. 218 of the Companies Act provided the defendant a remedy and defendant had accordingly complied with the procedure; (f) having heard no response nor having knowledge of any 'dispute' to the 9 February 2015 letter and the s. 218 notice, the winding up petition was validly presented on 9 March 2015, after expiry of the 21 days period; and (g) it was the plaintiff's conduct that is highly unprofessional and 'fraudulent' to use the 'first service no chop' excuse to repudiate the five year warranty, which had induced the defendant to buy the car at RM269,000.

[15] The plaintiff replies that (i) there is no dispute that the event which triggered the defendant's s. 218 notice dated 12 February 2015 stems from the payment by the defendant for a sum of RM2,973 on 2 February 2015; (b) the EWP was voided when the defendant failed to perform the third service in accordance to the extended warranty policy by Allianz and/or breached the term of EWP; (c) it is clear under the second half under the title 'exclusion' which states that the policy does not cover any loss damage on vehicle not serviced in accordance with service requirements of the manufacturer; (d) the plaintiff relies heavily on the *Fortuna Holdings Pty Ltd*

v. The Deputy Commissioner of Taxation of the Commonwealth of Australia [1978] VR 83 and *Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd* [2007] 3 CLJ 295; [2007] 3 MLJ 316 where the court may apply the principle to prevent abuse of the process of court and similarly to restrain the advertisement of a petition already; and (e) the amount claimed is *bona fide* disputed.

Findings

[16] With respect I am of the view that the contentions of the defendant are without merit. My reasons are these.

[17] I had directed the plaintiff to serve the application for *ex parte* injunctive relief (encl. 4) to be served on the defendant and I had adjourned the hearing to be heard on an *inter partes* basis at 2pm. Contrary to the defendant's contention on the non-service of the application for *ex parte* injunctive relief (encl. 4), in fact I find that notwithstanding that the said application was not served with the affidavit in support (encl. 5) but subsequently upon being alerted by the defendant, soon thereafter the said application was served on the defendant on 10 March 2015 by fax and e-mail as proven by the affidavit of service (encl. 8). Further, I find it is misleading of the defendant to assert that the application for *ex parte* injunctive relief (encl. 4) was only served on the defendant on 13 March 2015 when I find service of the same on the defendant was effected twice on 10 March 2015 (by email) and fax on 12 March 2015) (see exhs. S-3 and S-4 in the affidavit of service). I am of the view that having been served with encl. 4, the defendant ought to be present in court instead of giving excuses of non-service and of "I was not even properly dressed and could not had made (*sic*) it in time". To me, the defendant's statement of "The non-attendance of the hearing at 2pm was not meant to be disrespectful" is just plain lip service.

[18] In the light of my findings that there was proper service of encl. 4, in my considered opinion, the defendant's argument on the application of the provisions of O. 29 r. 1(2B) and O. 29 r. 1(2BA) of the Rules of Court 2012 do not apply in the context of the present case.

[19] The injunctive relief sought by the plaintiff is in the nature of a *Fortuna* injunction. In this regard, the principles for a *Fortuna* injunction propounded in *Fortuna Holdings Ptv Ltd* (*supra*) has been well articulated by the Court of Appeal in *Mobikom*'s case (*supra*) comprising the two branches of the principle that guide the court in the grant of an injunction at p. 321 as follows:

> (1) When a court restrains the presentation of a winding up petition to that court it exercises part of its inherent jurisdiction to prevent abuse of its process …
>
> The decisions of the courts have established the principle that the presentation of a winding up petition may be restrained by injunction where its presentation would amount to an abuse of the process of

A the court. The courts apply this principle similarly to restrain the advertisement of a petition already presented. The principle enables companies to be protected from threatened or apprehended oppression and damage from abuse of court process.

(2) … I consider that there is a second branch of the principle which
B may apply in situations where the first branch does not.

The second branch applies in cases where a petitioner proposing to present a petition has chosen to assert a disputed claim, by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative procedure. It may apply in cases where the petition, if presented, has a chance of success. In some
C cases both the first and the second branches of the principle apply.

[20] Further, I agreed with the plaintiff that *Mobikom*'s case is similar to the present case in that the defendant has presented the winding up petition (see p. 316 para. G and p. 321 para. E). Therefore, the argument of the defendant
D that the plaintiff's application for injunctive relief (encl. 4) is academic as the winding up petition was presented cannot be sustained following *Mobikom*'s case where the Court of Appeal held otherwise. I am of the view the argument of the defendant that this court has no jurisdiction to grant the injunctive relief is misconceived.

E **[21]** The defendant relied on the Supreme Court case of *Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd* [1988] 2 CLJ 424; [1988] 1 CLJ (Rep) 5; [1988] 2 MLJ 447 particularly on a *dicta* at p. 449 H-I left column; which *dicta* was also relied on by the learned Judge in *Azman & Tay Associates Sdn Bhd v. Sentul Raya Sdn Bhd* [2002] 4 CLJ 391 at p. 399 d-f for
F the proposition that this court has no jurisdiction to grant the injunction because the winding up petition has been filed. The passage relied on by the defendant reads:

… the Companies (Winding Up) Rules 1972 require that every petition should be advertised and it is immaterial whether the effect of such advertisement in a particular case would result in damage being caused
G to the company proposed for winding up. Even if the advertisement would in fact cause such damage, this is not a ground to prevent a *bona fide* petitioner from advertising.

[22] With respect the case of *Chip Yew Brick Works Sdn Bhd* (*supra*) can be distinguished from the present case. This has best expressed by Gopal Sri
H Ram JCA in *Mobikom*'s case at p. 327 as follows:

The present case must be distinguished from cases such as *Chip Yew Brick Works Sdn Bhd v. Chong Heer Enterprise Sdn Bhd* [1988] 2 MLJ 447 and *Morgan Guaranty Trust Co of New York v. Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95. These were cases in which no *quia timet* injunctive relief was
I sought to restrain the presentation of a winding up petition. They were

cases in which the respondent company resisted the petition on the ground that the debt on which the petition was founded was disputed. In other words the fact that the debt was *bona fide* disputed was raised by way of an answer or defence to the petition. It is in that context that Wan Hamzah SCJ spoke these words in *Chip Yew*:

> Even where the whole amount of debt claimed is disputed, the court can allow evidence to be adduced to enable it to consider whether or not there was a *bona fide* dispute and the court is competent to go into the evidence to consider that question for the purpose ultimately of determining whether it should exercise the discretion: *Re Welsh Brick Industries Ltd* [1946] 2 All ER 197.

[23] Further, I find the amount of RM2,973 claimed by defendant has been disputed by the plaintiff as can be seen from the title of the plaintiff's solicitors' letter dated 24 February 2015 addressed to M/s Abu Hassan & Associates, namely, "Re: Alleged Outstanding Sum of RM2,973 due to Loo Chay Meng" and the fact that the said sum has been deposited with the plaintiff's solicitors as stakeholders as proof that the plaintiff is able to pay the 'alleged debt' and there is no issue of the plaintiff's 'inability to pay its debt' as alleged in the s. 218 notice. I find the action of the defendant to enforce the payment of the disputed debt by means of the s. 218 notice is *mala fide* and with the intention of pressuring the plaintiff to pay a disputed debt and is an abuse of the court process.

[24] For the reasons stated, I am of the view that the defendant's application to set aside the order made by the court on 10 March 2015 ordered by the court to be heard on an *inter partes* basis but of which the defendant chose not to be present ought to be dismissed with costs of RM3,000 to be paid by the defendant to the plaintiff.

Arguments And Findings

Enclosure 14

[25] As regards to encl. 14, the plaintiff had filed an affidavit in support affirmed by Lim Ai Shi on 8 April 2015 (encl. 15). The grounds for seeking the proposed amendment is to reflect the real question in dispute and no prejudice would be caused to the defendant caused by the proposed amendment. The grounds relied on by the plaintiff included the following which have been confirmed by Lim Ai Shi at para. 3 of the affidavit in support (encl. 15):

(i) Defendan telah pada 11 Februari 2015 menyampaikan satu notis di bawah seksyen 218 Akta Syarikat, 1965 bertarikh 12 Februari 2015;

(ii) tuntutan Defendan adalah dipertikaikan seperti yang dinyatakan di dalam Afidavit Sokongan yang difailkan dan Defendan tidak mempunyai satu tuntutan yang sah terhadap Plaintif di bawah notis s. 218 tersebut;

(iii) setahu Plaintif, Defendan tidak memfailkan apa-apa tuntutan di dalam mana-mana Mahkamah untuk memutuskan tuntutan Defendan terhadap Plaintif dan tidak ada sebarang penghakiman yang telah diperolehi;

(iv) Plaintif adalah sebuah syarikat yang masih giat di dalam perniagaan dan berkemampuan untuk membayar hutang bila terhutang dan telah mendepositkan wang sebanyak RM2,973.00 di bawah protes dengan peguam caranya;

(v) Defendan telah menyerahkan notis s. 218 dengan niat untuk memaksa Plaintif membayar untuk sesuatu yang dipertikaikan;

(vi) jika Perintah-perintah yang dipohon tidak diberikan seperti yang dipohon, Plaintif akan terus mengalami kerugian yang tidak dapat dipampas oleh kos;

(vii) waranti oleh Plaintif adalah untuk dua (2) tahun sahaja, dan selepas tempoh tersebut adalah untuk tempoh selama tiga (3) tahun dalam Program Pelanjutan Waranti, ataupun "Extended Warranty Program (EWP)";

(viii) Program Pelanjutan Waranti ataupun EWP kereta tersebut dikeluarkan oleh pihak Allianz General Insurance Company (M) Bhd, melalui sijil nombor 10AK900018#KP014199 dan Plaintif tidak lagi bertanggungjawab;

(ix) Defendan telah memungkiri terma EWP tersebut kerana tidak membawa kereta Defendan untuk diservis pada servis ketiga.

[26] During the hearing of encl. 14, the defendant, Mr Loo Chay Meng representing himself through his firm, M/s Abu Hassan & Associates, informed the court (i) encl. 14 was served on him last Friday (10 April 2015); (ii) he objected to the plaintiff's application in encl. 14 and (iii) he did not intend to file any affidavit in reply.

[27] As there was no affidavit in reply to rebut the averments in Lim Ai Shi's affidavit in support, I granted O.I.T of encl. 14.

Enclosure 2

[28] The salient arguments raised by the defendant in submission in respect of the merits of prayer (b) (as amended) of the originating summons (encl. 2) are:

29. My warranty of RM2,973.00 was not allowed because the reason was "1st service no chop" or as the Plaintiff put it "EWP-VOID - NO proof or service records".

30. Now the Plaintiff has admitted in their affidavit the 1st service was carried out at 12016 km. (Exh. P-10 Affidavit Lim Ai Shi).

31. In the Plaintiff's Encl 1 & Encl 4, they now say 'warranty' void because of late service, and my LND dated 9/2/2015 & Invoice dated 2/2/2015.

Paragraphs 5 and 7 of the affidavit of Loo Chay Meng affirmed on 19 March 2015 read as follows:

> 5. Plaintif telah membayar kepada saya RM973.75 ("Refund tersebut") pada 9-9-2014 dan **telah menghidupkan 'Warranty' tersebut tanpa syarat** sebelum Surat Tersebut. Refund tersebut dibayar oleh Plaintif melalui ejen Plaintif GB Auto atas arahan Plaintif.
>
> 7. Selanjutnya, saya percaya Saman Pemula ini telah menjadi 'Akademik' dan Plaintif mesti menarik balik Saman Pemula ini atau Mahkamah ini hendaklah menolak Saman Pemula ini dengan kos atas sebab saya diberitahu bahawa **Plaintif sendirinya telah sekali menghidupkan semula 'warranty' tersebut pada 14-3-2015** untuk 'Flywheel' dan 'Repair Kit' (for Clutch) di mana jumlah lebih RM5000.00 tidak dikenakan bayaran kepada saya.
>
> (emphasis added)

[29] With respect I am of the view that the defendant's aforesaid submission cannot be sustained for these reasons.

[30] In respect of the vehicle purchased by defendant, the warranty for two years from the manufacturer and extended for a further three years by Allianz from 25 November 2013 until 24 November 2016 (exh. P9 of plaintiff's affidavit in support, encl. 1).

[31] It is not disputed that pursuant to the third s. 218 notice dated 12 February 2015 (exh. P1 of plaintiff's affidavit in support) the defendant demanded RM2,973 on 13 February 2015 from the plaintiff. This period in question is the period of the extended warranty which was voided by the defendant when the defendant failed to perform the third service in accordance with the EWP of Allianz. This will be apparent from my explanation below.

[32] I find that by looking at the EWP warranty by Allianz in exh. P9, it is clear under the title "exclusion" (in the English and Malay languages), under the English version, it is written:

> This Policy does not cover any loss damage … consequence of:
>
> 5. not serviced in accordance with Service Requirements of the Manufacturer …

Therefore, I find based on the plaintiff's records, the defendant breached the terms of the extended warranty at the third service interval when he serviced the vehicle in excess of 2,136/km as is evident from exh. P10 (third row).

[33] This was brought to the defendant's attention when the defendant issued the second s. 218 notice for the sum of RM973.75 on 12 September 2014 (exh. P4) where as early as 9 September 2014 the defendant was made aware of the breach *vide* the plaintiff's solicitor's letter dated 9 September 2014 that the extended warranty was voided (exh. P6). Nothing could be clearer than the contents of the said letter (material part) which I quote *verbatim*:

> As you were well informed, the 5 year warranty program covers a year manufacturer's warranty, and on expiration of the same, continues with a 3 year warranty under-written by a third party, Allianz Insurers. One of the fundamental terms and condition of the 5 year warranty program is that the subject vehicle has to be serviced on time in accordance with the service interval stipulated by the manufacturer.
>
> In your clients' case, the subject vehicle breached this fundamental term on its 3rd service interval where mileage was breached by 2136km.
>
> As such, this voids the 5 year warranty cover.

[34] I find that the payment of RM973.75 was made by the third party and not meant to affirm the extended warranty which was voided. This is evident from the letter dated 12 September 2014 from the plaintiff's solicitors to M/s Abu Hassan & Associates, exh. P7 which categorically stated:

> While our client's deny your baseless allegations on the annulment of warranty as explained in our letter of 9th September 2014, we are instructed that the service centre in Klang which attended to your client's car is willing to pay your clients the said amount of RM973.75 as claimed of in your Statutory Notice, strictly without prejudice and without admission of liability whatsoever.
>
> However, please note that any offers of settlement made herein or by any third party is not to be construed as affirming the warranty that was breached, nor does it constitute any admission of liability on the part of our clients.

I am of the view that the defendant's assertion that the said plaintiff's letter is an afterthought is a bare statement. Therefore, I agreed with the plaintiff's submission that the defendant accepted the payment by the third party despite having knowledge of the qualification made by the plaintiff in its letter as emboldened above.

[35] Based on the chronology of events and substantiated by the documentary proof, I find that the extended warranty was voided by the defendant's own breach and the plaintiff is not responsible for the extended warranty.

[36] Based on the evidence adduced, I am of the view that the defendant ought not to be allowed to take advantage of a situation brought about by his own act or omission. For this, I rely on the case of *Poon Guan Sdn Bhd v. Sem Siong Industries Sdn Bhd* [1983] 2 CLJ 208; [1983] CLJ (Rep) 326; [1983] 2 MLJ 317. The facts in this case are: The respondents had leased the premises to the appellants/plaintiffs. It was agreed that if the bowling alley of the respondents was closed for reasons beyond their control, they reserved the right to terminate the tenancy by giving three months' notice in advance. The respondents informed the appellants that the bowling alley would be closed and gave notice to the appellants. The evidence showed that the real reason for closing the bowling alley was the heavy financial losses incurred

due to bad maintenance and bad location (at p. 317 (see Headnotes)). The real issue for determination turned on the interpretation of the second limb of para. 6 of the tenancy agreement "or our Bowling Alley is closed for reasons beyond our control".

[37] At p. 320B, Hashim Yeop A Sani FCJ (as His Lordship then was) (delivering the judgment of the Federal Court) held:

> The underlying principle there is that unless a contract clearly and specifically so provides, the court will not construe an avoiding provision contained in it in such a manner so as to permit a party to take advantage of a situation brought about by his own act or omission.

[38] For the reasons stated, I find that the plaintiff has discharged its burden of proving that it is entitled to the declaration sought as per prayer (b) of the originating summons as amended.

Conclusion

[39] I hereby made the orders referred to in para. 8 above.